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Nos. 78-432, 78-435, 78-436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, PETITIONER

v.

BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL CORPORATION, AND UNITED STATES OF AMERICA, RESPONDENTS

KAISER ALUMINUM & CHEMICAL CORPORATION, PETITIONER,

v.

BRIAN F. WEBER, RESPONDENT

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONERS

v.

BRIAN F. WEBER, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Michael R. Fontham
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
1000 Whitney Bank Building
New Orleans, Louisiana 70130
Telephone: (504) 581-3200
Attorneys for Respondents

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

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QUESTION PRESENTED

May an employer and labor union, solely in order to achieve a desired ratio of minority workers in craft positions at a manufacturing plant and in the absence of any prior discrimination against the minority workers at that plant, institute a racial quota for admission to craft training programs that is preferential to members of minority groups and discriminates against whites, where job seniority would ordinarily determine entry into the training programs?

STATEMENT OF THE CASE

1. In order to achieve a desired ratio of minority workers in craft jobs at a manufacturing plant in Gramercy, Louisiana, petitioners, Kaiser Aluminum & Chemical Corporation ("Kaiser") and United Steelworkers of America ("USWA"), instituted a racial quota requiring that at least 50 per cent of all applicants selected into craft training programs be members of minority groups.

The racial quota of Kaiser and USWA was instituted as part of the 1974 Labor Agreement executed by the parties. The agreement provides in part that "certain goals and time tables" shall be established by a joint committee to facilitate the achievement of a "desired minority ratio" in existing trade, craft and assigned maintenance classifications at various Kaiser plants,

including the Gramercy Plant.[1] The percentage "goal" established by the joint committee for the Gramercy Plant was 39 per cent, based on the percentage of minority workers in the available work force in the area.[2] The agreement stated:

> [A]t a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates . . . .[3]

Apart from the racial quota imposed by Kaiser and USWA, the sole qualification for entry into the training programs is the seniority of applicants.[4] This seniority is determined on the basis of "length of employment at the plant and is not affected by departmental or job seniority. All workers at the plant are included in this seniority line."[5]

Respondent, Brian F. Weber, was employed as a lab analyst at the Gramercy works of Kaiser. In April, 1974, a company "bid" for on-the-job training programs in three craft categories was posted by Kaiser. Pursuant to the standard procedure of Kaiser and USWA, applicants

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1 Fifth Cir. App., 196.
2 Fifth Cir. App., 95.
3 Fifth Cir. App., 196.
4 Fifth Cir. App., 197.
5 Fifth Cir. App., 198.

were to be selected for those programs on the basis of seniority. However, a condition of the bid was that at least half of the persons selected as prospective trainees would be applicants who were members of minority groups.[6]

Mr. Weber and other white members of the plaintiff class applied for the training programs. However, members of minority groups with less seniority than white employees were selected preferentially by Kaiser for these programs to meet the established quota of at least 50 per cent minority representation.[7] In each instance of selection of a minority applicant, one or more white workers with greater seniority than members of minority groups selected for the training programs were denied entry into the training programs solely on the basis of the racial criterion.[8]

Subsequently, company bids were posted for additional craft training openings.[9] The selections for these openings were made on the basis of the 50 per cent minority requirement. One of the bids barred applications by any white employee, as the bid was specifically limited to minority employees only.[10] In all, in the period April through October, 1974, seven minority employees were selected for positions in training programs in preference to white employees pursuant to the 50 per cent quota.[11]

6 Fifth Cir. App., 197-98.

7 Fifth Cir. App., 198.

8 Fifth Cir. App., 197.

9 Fifth Cir. App., 198.

10 Fifth Cir. App., 198.

11 Fifth Cir. App., 198.

2. Mr. Weber filed a charge of race discrimination with the Equal Employment Opportunity Commission ("EEOC").[12] No action was taken and a right-to-sue letter was issued after 180 days.[13] Mr. Weber filed the right-to-sue letter in the district court and counsel was requested by the district court to investigate the charge and institute suit if appropriate. The Complaint was filed on December 31, 1974.[14]

Prior to the filing of Answers by Kaiser and USWA, counsel for Mr. Weber was contacted by a staff attorney of the EEOC. A request was made by the EEOC attorney that the pleadings filed on behalf of Mr. Weber be provided to the EEOC. On February 1, 1975, the pleadings already filed in the case were transmitted to the EEOC and additional pleadings were transmitted on February 14, March 7 and March 19, 1975.[15] On March

12 Fifth Cir. App., 58-59.

13 Fifth Cir. App., 14-15.

14 Fifth Cir. App., 1-5. Thereafter, counsel was formally appointed to represent Mr. Weber. See 42 U.S.C. §2000e-5(f)(1). Fifth Cir. App., 6-8.

15 The correspondence to Marian Halley, Esq., a staff attorney of the EEOC, is not part of the record. In view of the proposal by the United States of America and the Equal Employment Opportunity Commission for a remand of this case, and the reliance of these parties on extra-record "evidence," we believe a review of these facts is appropriate.

On February 1, 1975, the pleadings on file, including the Complaint, were transmitted to Ms. Halley. On February 14, 1975, the Class Action Allegations and a stipulation of facts proposed by the plaintiff were transmitted. The Motion to Maintain Class Action, Memorandum in Support of Motion to Maintain Class Action, notice of the class action hearing, and a draft of the pre-trial order were sent to Ms. Halley on March 7, 1975. The order designating the case a class action, the Approved Form of Notice to the class, and the Pre-Trial Order were transmitted on March 19, 1975. However, the EEOC failed to enter the case at the trial court level as an intervenor, *amicus curiae*, or in any other capacity.

20, 1975, a telephone request was made by the EEOC for documents that had already been transmitted. The pre-trial memorandum of the plaintiffs was sent to the EEOC on March 28, 1975.

The trial was conducted on April 1, 1975. At that time, a stipulation was read into the record that "an attorney by the name of Marian Halley, with the Equal Employment Opportunity Commission, has been in touch with all counsel in this case. . . . [T]he EEOC has some interest in this case, although it decided not to intervene prior to this trial, and [the EEOC] may want to get involved, either with a post-trial brief to Your Honor, or if the case is appealed, at the level of the Fifth Circuit."[16] In a telephone discussion three days after the trial, Ms. Halley informed counsel for Mr. Weber that the EEOC had determined that it would not intervene at the district court level. Copies of the stipulation of the parties and six of the seven exhibits filed into evidence were transmitted to Ms. Halley.[17]

16 Fifth Cir. App., 53.

17 The relevant portion of the seventh trial exhibit, the 1974 Labor Agreement, was contained in the stipulation.

The case was under advisement in the district court for more than a year. The decision of the district court was rendered June 17, 1976. In November, 1975, while counsel for Mr. Weber was at the EEOC (in connection with settlement discussions in a case in which counsel was appointed to represent a black Title VII plaintiff), counsel sought out Ms. Halley to further discuss the possibility of participation in the *Weber* case by the EEOC. Counsel was informed that the EEOC had determined that it would not intervene until the case reached the appellate level.

The suit of Mr. Weber was filed and certified as a class action.[18] Pursuant to the order of the district court, the Approved Form of Notice was required to be posted "on all employee bulletin boards at the Gramercy, Louisiana works . . . and at the Union Hall [of USWA]."[19] The Approved Form of Notice stated in part that the suit "alleges that the selection policies of the defendants for [on-the-job] training programs, which require the selection of minority applicants to fill at least fifty percent of the available vacancies in the training programs, constitute race discrimination [in violation of Title VII and 42 U.S.C. §1981]."[20]

3. At the trial, substantial evidence was presented by all the parties concerning the purported justifications for the racial quota, the history of employment practices at the Gramercy plant, and the training programs requiring prior experience that pre-existed the training programs instituted under the 1974 Labor Agreement. USWA contended and attempted to prove that discrimination against blacks had occurred at the Gramercy plant.[21] The district court rejected this argument and

18 Fifth Cir. App., 1-5, 20-23.

19 Fifth Cir. App., 37.

20 Fifth Cir. App., 35. The notice, of course, had the formal effect of binding only the white members of the class to the outcome. However, as it was posted on all employee bulletin boards and at the union hall, it provided notice to all employees of the pendency and nature of the suit.

21 E.g., Post-Trial Brief of Defendant United Steelworkers of America; Fifth Cir. App., 110-11.

found that there was no prior discrimination at the Gramercy plant.[22]

The primary reason for the adoption of the 50 per cent quota for selection into the craft training programs was the small percentage of minority workers in craft jobs as compared with the minority labor force as a whole.[23] Prior to the institution of the training programs under the 1974 agreement, only about two per cent of the craftsmen at the Gramercy plant were minority employees.[24] According to the Industrial Relations Superintendent of Kaiser, Kaiser and USWA were "striving to obtain . . . a 39 per cent minority population in each of the craft families . . . .[25] The one-for-one hiring program was the means adopted to achieve this goal.

Kaiser was motivated to adopt the 50 per cent quota in part because of its perception of the wishes of federal contract compliance officers.[26] However, Kaiser was not ordered to implement this action.[27] Kaiser had a substantial economic reason to comply with federal contract compliance suggestions.[28] In addition, Kaiser believed

22 Opinion of the district court, 415 F. Supp. 761, 764.

23 Fifth Cir. App., 19.

24 Fifth Cir. App., 98; Kaiser Exh. 3.

25 Fifth Cir. App., 95.

26 Fifth Cir. App., 77, 87, 145.

27 Fifth Cir. App., 88.

28 Fifth Cir. App., 121.

that it was furthering a national social policy by the adoption of the racial quota.[29]

USWA appears to have concurred in the adoption of the racial quota as an affirmative action measure.[30] However, USWA had negotiated for years for the institution of training programs to provide its members with access to craft jobs.[31] In the words of the attorney for USWA, "the Union's efforts were directed towards obtaining additional opportunities for their members, who were also Kaiser employees, as opposed to creating opportunities for people from the street."[32] Thus, the training programs were instituted to benefit union members, and were not solely an affirmative action measure containing incidental benefits for white as well as black union members.

The racial quota was not implemented by Kaiser and USWA to remedy past discrimination, but instead was designed to help uplift the employment status of minority workers as a class.[33] As USWA states in its Petition

29 Fifth Cir. App., 149-50. The district court indicated that the racial quota was also adopted to avoid "vexatious litigation," but there was no evidence that any black employees had threatened suit based on the makeup of craft positions at the Gramercy plant. The agreement was adopted for a number of plants, some of which may or may not have been potential litigation targets.

30 See Petition for a Writ of Certiorari filed on behalf of USWA in this Court, No. 78-432.

31 Fifth Cir. App., 115.

32 Fifth Cir. App., 133.

33 Opinion of the district court, 415 F. Supp. at 765. Fifth Cir. App., 210.

for a Writ of Certiorari, "the agreements were not confined to curing past employer discrimination, and no effect was made to assess on a plant-by-plant basis the employer's potential culpability for the absence of black craftsmen."[34] No effort was even made by Kaiser and USWA to determine that the favored minority workers actually suffered societal discrimination.[35] Indeed, the director of equal employment opportunity affairs of Kaiser admitted that some blacks may not have suffered societal discrimination, while some whites may have endured this hardship.[36] Nevertheless, the racial quota in this case was enacted because the "sum total of experience" indicated that minorities generally have suffered past discrimination, not at Kaiser in particular, but in society at large.[37]

Although the percentage of minority craftsmen at the Gramercy plant was smaller than the minority representation in the labor force overall, it was not smaller than the percentage of minority craftsmen in the Gramercy area.[38] Indeed, minority craftsmen were virtually unavailable.[39] Kaiser, under federal super-

34 Petition for a Writ of Certiorari of USWA, No. 78-432 at 5.

35 Fifth Cir. App., 161, 168.

36 Fifth Cir. App., 158.

37 Fifth Cir. App., 157.

38 Fifth Cir. App., 119-20.

39 Fifth Cir. App., 119-20, 146.

vision,[40] tried a number of affirmative action methods to attract minority craftsmen. The company set goals and timetables to increase the percentage of minorities in the crafts. In addition, it advertised "in minority-only newspapers" and maintained separate craft application files.[41] According to the Industrial Relations Superintendent, Kaiser "always" tried to locate and hire blacks in preference to whites for craft openings.[42] However, the few minority craftsmen in the area were already employed "because companies like Kaiser anywhere are hiring blacks first, or they're attempting to get blacks on the payroll."[43] The quota was instituted because "the officials of both Kaiser and the Steelworkers realized that something more than the ordinary, look until you find them, had to be done to get blacks into the crafts."[44]

Prior to the institution of the training programs involving no prior experience requirement in 1974, Kaiser filled its craft positions primarily by hiring fully trained craftsmen from outside the plant.[45] However, pursuant to the efforts of USWA to open craft jobs to union members within the plant, Kaiser instituted two partial training programs prior to 1974 in which persons with

40 Fifth Cir. App., 121.

41 Fifth Cir. App., 99.

42 Fifth Cir. App., 99.

43 Fifth Cir. App., 100.

44 Fifth Cir. App., 101. This statement was made by Dennis E. English, Industrial Relations Superintendent of Kaiser.

45 Fifth Cir. App., 103.

previous experience were accepted and trained.[46] The training programs involved acceptance of persons with experience of one year in the Carpenter-Painter craft from 1964 until 1971, acceptance of applicants with three years experience in the General Repairman category from 1968 until 1971, and selection of persons with two years experience in the General Repairman craft from 1971 until 1974.[47]

In these training programs involving selection of employees with prior experience, it was necessary only for Kaiser to provide training to the employee for the balance of training he did not have.[48] Thus, the General Repairman training program into which employees with three years experience were selected lasted two years; when this program was modified for selection of applicants with two years experience, the training program was lengthened to three years.[49] The minimum cost to Kaiser of each year of training, for each trainee, was $15,000 to $20,000.[50]

Of 292 craft employees at Kaiser in 1975, only 28 entered through the prior experience training programs.[51] These training programs were open to members of minority groups as well as whites with the

46 Fifth Cir. App., 102, 196-97.

47 Fifth Cir. App., 196-97.

48 Fifth Cir. App., 102.

49 Fifth Cir. App., 197.

50 Fifth Cir. App., 107.

51 Fifth Cir. App., 197.

requisite experience.[52] Of the 28 persons who completed the prior experience training programs during their 10 year existence, seven per cent were black.[53] This percentage is identical to the ratio of black bidders with no prior experience in the top 28 positions of seniority at the time of the institution of the training programs at issue in this case.[54]

4. The district court issued an opinion holding the racial quota illegal under Title VII.[55] The district court also found that the quota adopted by Kaiser and USWA was not implemented "with a view toward correcting the effects of prior discrimination."[56] In addition, the district court found:

> The evidence further established that Kaiser had a no-discrimination hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on the job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser.[57]

52 Fifth Cir. App., 196.

53 Fifth Cir. App., 196. Two of 28 persons in the training programs were black.

54 R., Joint Exh. 3.

55 415 F. Supp. 761.

56 *Id.* at 765.

57 *Id.* at 764.

The court of appeals affirmed,[58] holding that "[i]t is undeniable that the 1974 Labor Agreement's one-for-one ratio for training eligibility discriminates on the basis of race."[59] The court held that while remedial action designed to correct past discrimination by the employer and restore employees to their "rightful place" is permissible under Title VII, racial preferences are not.[60] The court of appeals concluded:

> Where admissions to the craft on-the-job training programs are admittedly and purely functions of seniority and that seniority is untainted by prior discriminatory acts, the one-for-one ratio, whether designed by agreement between Kaiser and USWA or by order of court, has no foundation in restorative justice, and its preference for training minority workers thus violates Title VII.[61]

ARGUMENT

We agree with the petitioners that this case presents an issue of great importance. However, this Court may

58 The opinion is reported at 563 F. 2d 216. Judge Wisdom dissented from the decision.

59 563 F. 2d at 223.

60 *Id.* at 225.

61 *Id.* at 226. After the decision of the court of appeals, the United States and Equal Employment Opportunity Commission, which had participated at the appellate level as *amicus curiae*, moved for and were granted permission to intervene as parties. The appellants petitioned for rehearing and suggested rehearing *en banc*. These petitions were under consideration for more than three months, but were denied on April 17, 1978. 371 F.2d 337.

not wish to reach and dispose of the issue at this time. Valid grounds exist for a denial of certiorari. The decision of the court of appeals is correct under the law, properly distinguishing remedial action from preferential treatment of minority workers at the expense of whites.

If the Court does decide to grant the writ of certiorari, it should not permit the resolution of the issue to be clouded by speculation and gratiutous opinions concerning the adequacy of the fact-finding of the district court and the factual review of the court of appeals. If this injection of intimations will hinder the process of review, the writ should be denied. The suggestion of United States and EEOC ("the Government") that the case be remanded has no basis and is nothing more than a transparent effort to avoid the resolution of the issue on facts that are fatal to the Government's position. This suggestion should be rejected.

I. Valid Reasons Exist To Deny The Writ Of Certiorari

While we do not dispute the contention of the petitioners that this case involves an important issue, the Court nevertheless would have good reason to deny the writ of certiorari. Numerous considerations could lead the Court, as a judicial tribunal with ultimate authority and unique responsibility, to refrain from exercising its discretionary review. This decision would be supported by at least the following factors.

First, the decision of the court of appeals is consistent with the express language and intent of Title VII and the

decisions of this Court. Title VII specifically prohibits an employer from discriminating against *anyone* on the basis of race.[62] In addition, it explicitly prohibits race discrimination in the selection of applicants for training programs.[63] The legislative history of Title VII establishes that the intent of Congress is consistent with the plain meaning of the prohibition.[64] This Court, in *McDonald* v. *Santa Fe Trail Transportation Co.*,[65] ruled that white persons may assert claims under Title VII and the same standards that are used in cases involving minority workers are applicable to the claims of whites.[66] In *Griggs* v. *Duke Power Co.*,[67] the Court reviewed the purpose and intent of Congress in adopting Title VII. It stated: "[T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination,

62 42 U.S.C. §2000e-2(a). This section prohibits discrimination "against any individual . . . because of such individual's race . . . ." See also 42 U.S.C. §2000e-2(j).

63 42 U.S.C. §2000e-2(d).

64 The legislative history is exhaustively reviewed in *Jersey Central Power & Light Co.* v. *Local 327, IBEW*, 508 F.2d 687 (3d Cir. 1975) and *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir., 1974). The intent of Congress insofar as it affects this case is amply demonstrated in the "Objections and Answers" concerning Title VII submitted by Sen. Joseph S. Clarke, a floor manager of the bill. It states:

> Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.
>
> Answer: Quotas are themselves discriminatory.
>
> 110 Cong. Rec. at 7218 (1964).

65 427 U.S. 273, 96 S. Ct. 2574 (1976)

66 427 U.S. at 280, 96 S. Ct. at 2579.

67 401 U.S. 424, 91 S. Ct. 849 (1971).

or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."[68] As recently as the last term, in *City of Los Angeles, Department of Water and Power* v. *Manhart*,[69] the Court in a sex discrimination case stated that Title VII was "designed to make race irrelevant in the employment market."[70] In addition, the Court stated that "the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes."[71] Thus, the preference in this case was properly ruled to violate Title VII.

Second, the decision of the court of appeals is supported by the analagous holding of this Court in *Regents of the University of California* v. *Bakke*.[72] The Court in *Bakke* invalidated a special medical school admissions program that reserved 16 per cent of the places in the entering class for members of minority groups. As white applicants were not permitted to compete for the seats reserved for minority applicants, the special admissions program was ruled illegal.[73] *Bakke* was not decided under Title VII and involved academic considerations unique to the university setting. Nevertheless, it provides strong

68 401 U.S. at 430-31, 91 S. Ct. at 853.

69 98 S. Ct. 1370 (1978).

70 *Id.* at 1376.

71 *Id.*

72 98 S. Ct. 2733 (1978).

73 *Id.* at 2764. (Powell, J., announcing the judgment of the Court).

support for the holding of the court of appeals, especially since many of the factors tending to support the admissions program in *Bakke* are not present in this case.[74]

Third, while the decision of the court of appeals has broad importance, it will have a direct impact only in the Fifth Circuit. The post-decision experience in the Fifth Circuit could provide a barometer for a future resolution of the issue presented on a national scale. This consideration also applies to the decision in *Bakke*, which has been on the books only for a few months. The Court may wish to allow additional time for the assessment of the impact of the *Bakke* holding. Thus, the Court may wish to delay the resolution of the issue in this case, especially since the decision of the court of appeals is not out of step with the prior decisions of the Court.

74 Title VII repeatedly has been interpreted to prohibit preferences for any race. See, e.g., *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31, 91 S. Ct. 849, 853 (1971). *Bakke* was decided under Title VI and the Fourteenth Amendment, and the meaning of Title VI was disputed. Moreover, the First Amendment interest in furthering academic freedom is not present here. Furthermore, in *Bakke* the admissions program as a whole was not based solely on objective criteria. E.g., see 98 S. Ct. at 2740 (Powell, J.); 98 S. Ct. 2807 (Blackmun, J., dissenting). In this case, the seniority criterion for selection into training programs provides benefits based on time of service to the employer, applies equally in the absence of discrimination in the provision of seniority rights, and is valid under Title VII. 42 U.S.C. §2000e-2(h).

II. In The Alternative, The Writ Should Be Granted Only For The Resolution Of The Basic Issue: The Legality Of A Racial Quota Implemented At The Expense Of The Seniority Rights Of Whites To Achieve A Desired Minority Ratio In Designated Jobs.

Good reasons would support a decision to deny the writ of certiorari. On the other hand, the Court may be persuaded by the importance of the issue to grant the writ. If so, the Court should review this case only to resolve the legality of a racial quota implemented at the expense of the seniority rights of whites to achieve a desired minority ratio in designated jobs.

While the "Question Presented" in each of the petitions appears to reflect the petitioner's characterization of the basic issue in this case, we are concerned about the gratiutous assertions of Kaiser and the Government concerning the adequacy of the factual findings in the courts below.[75] We do not understand these parties to be requesting a review of the facts, but they do appear to suggest that the Court should subjectively assume that past discrimination, after all, must have been present at the Gramercy plant, despite the holding of the district court and court of appeals to the contrary. We believe that the record provides full support, including statistical data, for the findings of the

75 Petition for a Writ of Certiorari of Kaiser, No. 78-435 at 11; Petition for a Writ of Certiorari of the Government, No. 78-436 at 14.

district court and the court of appeals. In any event, it is not the function of this Court to review or make assumptions concerning factual determinations of the lower federal courts. If the writ is to be granted, it should contemplate the resolution of the important legal issue that is presented. In addition, the Court should reject the frivolous recommendation of the Government that the case be remanded for a reopening of the record.

A. *The Only Issue Worthy of Review Is the Legal Question Presented Under the Facts as Determined in the Lower Courts.*

The factual determinations of the district court and the court of appeals are correct. The district court expressly held that there was no past discrimination at the Gramercy plant. The record is complete and fully supports this finding. The only issue of importance is the legal question presented under the facts. Therefore, if certiorari is granted, the factual determinations of the district court and court of appeals should be accepted.

The Government mistakenly claims that none of the parties had an incentive to prove past discrimination at the trial, but USWA did make this attempt and the effort was unsuccessful.[76] The Government can be excused for not knowing this, since it declined to take part in the trial. In addition, the district court was fully aware of the importance of an examination of the prior conduct of

76 R., Post-Trial Brief of Defendant, United Steelworkers of America.

Kaiser in the resolution of this case. The evidence received extensive consideration at the trial and appellate level. Only a strained interpretation of the facts could have justified any finding of past discrimination.

The Gramercy plant was opened in 1957 or 1958 and discrimination against blacks never occurred at this plant.[77] Blacks who were hired when the plant opened have obtained senior status and high-paying jobs.[78] Separate lines of seniority for minority and non-minority employees were never maintained prior to the institution of the reverse racial quota.[79] All workers are given plant-wide seniority. Selection for training programs, in the absence of the racial quota, is based on length of employment at the plant.[80]

As the court of appeals noted, although a low percentage of minority workers were employed in craft jobs, minority craftsmen were not available in the local labor force.[81] No disparity existed between the ratio of minority craftsmen at Kaiser and their availability in the work force. In addition, although USWA argued at the trial that the prior experience requirement for the pre-1974 training programs was discriminatory, this contention had no merit. First, the statistics demonstrate

77 Fifth Cir. App., 122.

78 Fifth Cir. App., 113.

79 Fifth Cir. App., 114-15.

80 Fifth Cir. App., 198.

81 563 F.2d at 224 n.13; Fifth Cir. App., 119-20, 146. This fact does not appear to be disputed.

that the prior experience requirement did not have a disparate impact on minority workers.[82] Second, the evidence established that prior experience was not only a prerequisite for entry into training programs, but also a substitute for training. Kaiser was forced to extend its training programs when the prior experience requirement was dropped to the full extent of the experience previously required.[83] As the training cost $15,000 to $20,000 per year per trainee, the prior experience requirement was job related.[84] Third, the prior experience training programs involved only 28 persons over 10 years. As the court of appeals held,[85] this program is too limited in scope to justify the racial quota at issue in this case.

Despite the implied contentions of incidental discrimination, none of the petitioners claim that any of the minority workers preferred under the racial quota ever suffered discrimination at the Gramercy plant. Thus, it is conceded that none of these parties are identifiable victims of past discrimination. In addition, no one claims

82 Of the 28 persons who entered the prior experience training programs during their 10 year existence, two were black. App., 196. Of the 28 bidders having the most seniority at the Gramercy plant at the time of trial, two were black. R., Joint Exh. 3. Had the prior experience requirement never existed, these 28 employees would have been eligible to bid for the first 28 positions in training programs requiring no experience. The percentage of minority workers that entered the training programs with the prior experience requirement is identical to the percentage that presumably could have entered if the prior experience requirement had never existed.

83 Fifth Cir. App., 197.

84 Fifth Cir. App., 107.

85 563 F.2d at 224 n.13.

that the racial quota was adopted as a remedy for past discrimination. The sole purpose for favoring the minority workers at the expense of white employees is the general purpose for the inclusion of the quota in the 1974 Labor Agreement: to achieve a designated ratio of minority workers in the crafts in conformity with a policy to favor classes presumed to be disadvantaged.

The important issue in this case is the legality of a racial quota used as an affirmative action measure. Most employers, whether or not they fear the possibility of litigation or government interference in their affairs, do not believe they have discriminated in the past. Yet employers are required under federal contract compliance programs to establish "goals" and "timetables" for the elimination of "underutilization" of minorities; quotas and other preferences favorable to minority workers are commonly implemented to satisfy the regulatory agency.[86] A substantial number of white workers today are suffering employment discrimination because of these practices.

The legality of the use of a quota to prefer government-designated classes is also important because the EEOC has proposed guidelines to legalize employment discrimination against non-minority workers under affirmative action programs.[87] The

86 41 C.F.R. §§60-2.11, 60-2.12.

87 Interpretative Regulations Guidelines Relating to Remedial and/or Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964. Comments relating to the proposed guidelines were to be submitted to the EEOC on or before March 1, 1978. The revisions drafted in light of comments received by the EEOC have not been finalized.

proposed guidelines would permit or require the use of racial or sexual preferences or quotas whenever an "underutilization" of a designated class is found to exist in any particular job classification.[88] The preferences would be legalized even in the absence of past discrimination against minorities. They could be granted on a class basis, with no need for restriction to identifiable victims of past discrimination committed by the employer or other person subject to Title VII.[89]

The proposed guidelines would eliminate non-minority employees as potential claimants eligible for administrative determinations of their claims whenever employers have granted preferences to minorities under affirmative action programs.[90] In addition, under Section 713(b) of Title VII,[91] the guidelines could provide a complete defense barring any action under Title VII

88 *Id.*, Part III. A "self-analysis" may show a need for affirmative action solely on the basis of disparities in the percentage of minority or female employees in the work force of the employer as compared to minority persons or females in the "relevant job market who possess the basic job related qualifications." *Id.* The "affirmative action" programs "include the use of race, color, sex, and ethnic-conscious goals and timetables, ratios, or other numerical remedies . . . ." *Id.*

89 *Id.*, Part II, Part III. The affirmative action would be required even if no admission or finding of past discrimination exists and even if there is no evidence sufficient to prove a violation of Title VII. Preferences need not be restricted to identifiable victims of past discrimination by the employer or other persons subject to Title VII.

90 *Id.*, Part V. The EEOC would dismiss charges filed by non-minority employees under these conditions.

91 42 U.S.C. §2000e-12(b).

against an employer that relied on the guidelines in discriminating against non-minority employees.[92] While the resolution of the issue on this case would not determine the validity of the proposed guidelines, it would provide an on-point determination of whether Title VII prohibits the use of employment preferences to uplift the economic status of classes believed to be disadvantaged. If any issue is to be resolved in this case, it should be the legal issue that is important to the employment hopes of millions of non-minority workers.

B. *The Transparent Request of the Government for a Remand Should Be Denied.*

In view of the conflict between Title VII and the present "affirmative action" policy of the Government, we are not surprised the Government wishes to avoid the resolution of the issue by the Court. The Government would like to delay the ultimate decision or at least have the issue resolved on a more favorable set of facts. However, instead of simply requesting that the writ be denied, the Government suggests that the holding of the court of appeals be "un-decided" by a remand for further proceedings. The asserted grounds for this request are ludicrous.

The Government first suggests that the case should be remanded for a determination of whether the action

92 *Id.* This section provides that if an employer commits an unlawful employment practice "in reliance on any written interpretation or opinion of the Commission," the employer may not be subject to liability in "any action or proceeding based on any alleged unlawful employment practice."

of Kaiser and USWA was consistent with the requirements of Executive Order 11246.[93] No doubt, Kaiser and USWA are surprised to learn of the Government's uncertainty as to whether their action is even proper under the Executive Order. In any event, in view of the Government's acceptance of the "premise that the Executive Order cannot override Title VII,"[94] the proposed analysis of the meaning of the Executive Order would be useless. The racial quota enacted by Kaiser and USWA either violates Title VII or it does not. The consistency of the program with the Executive Order is at best an incidental academic issue. We do not believe a remand is appropriate to obtain an advisory opinion from the district court.

The Government also suggests that the case be remanded for reconsideration in light of *Bakke*. On its face, this suggestion does not even promise an interesting academic exercise, because *Bakke* supports the decision of the court of appeals.[95] The Government apparently recognizes this problem, because it deemed it necessary to lodge documents from its files with the Clerk of this Court in an attempt to suggest an issue under *Bakke* requiring the receipt of new evidence. This alleged issue relates to "the presence of governmental

93 Petition for a Writ of Certiorari of the Government, No. 78-436 at 17.

94 *Id.* at 16.

95 See text at pp. 74-76 *supra*.

findings of discrimination by the employer [and] governmental participation in developing the affirmative action program."[96]

While the Court in *Bakke* did review past decisions involving government findings "of past discrimination by the industries affected [and government-fashioned] remedies . . . to rectify the discrimination,"[97] the Court broke no new ground in this area. The decisions reviewed by this Court in deciding *Bakke* were available to the district court and the court of appeals. Moreover, as the Government has conceded that actions taken in furtherance of the Executive Order would not survive a conflict with Title VII, the relevance of the extent of government involvement is difficult to fathom. Furthermore, the record is complete with respect to the reasons for the adoption of the racial quota: Kaiser and USWA voluntarily adopted it to *avoid* governmental intervention. The government did not fashion a remedy to rectify past discrimination and the documents lodged with the Clerk do not suggest that it did.[98] Finally, a review of the documents filed by the Government reveals the lame nature of this transparent proposal to "un-decide" the case.

96 Petition for a Writ of Certiorari of the Government, No. 78-436 at 18.

97 *Regents of the University of California* v. *Bakke*, 98 S. Ct. 2733, 2754 (1978) (Powell, J.) (Slip Op. 32). This is the passage primarily relied on by the Government.

98 In view of the Government's uncertainty as to the consistency of the racial quota with the Executive Order, it is hard to believe that the suggestion is seriously offered that the quota was implemented by the Government.

In reviewing the description of these documents in the Petition of the Government, we expected to find that they contained something of significance. After all, the documents were characterized as containing "findings and recommendations."[99] Upon obtaining copies,[100] however, we found that the missing "evidence" consists only of a 1973 file memorandum and a letter and enclosure mailed in 1971, more than three years prior to the enactment of the racial quota.[101] Only a few sentences in these documents relate to the crafts or to training programs at the Gramercy plant. The statements made by the OFCC appear to be nothing more than preliminary opinions or suggestions.

In addition to the tenuous relevance and uncertain reliability of the 1973 file memorandum and 1971 letter, these documents on their face do not say what the Government represents them as saying. Contrary to the exaggerated claim of the Government, no statement is contained in the 1973 file memo that Kaiser "waived its

99 Petition for a Writ of Certiorari of the Government, No. 78-436 at 18.

100 The Government failed to include the content of the documents in its Appendix and failed to mail copies to the parties. The documents were provided, however, after we requested them.

101 We know of no authority for lodging these documents with the Clerk, but presume that the Court can look at anything it desires in reaching its decisions. Of course, the documents have not been cross-examined, contain hearsay within hearsay, and presumably were carefully selected on the basis of a full file search designed to produce something favorable to the Government's position. In these circumstances, and in view of the volume of documents in the files of the federal Government, it is significant that the Government could find nothing more substantial than a file memorandum and an aged letter and attachment. In any event, a remand should not seriously be considered on the basis of the Government's so-called "evidence."

prior experience requirement for whites but not for blacks, who had applied for craft positions."[102] Instead, this file memo states that "several" Caucasians did not possess the required prior experience for transfer into the maintenance crafts and the company voluntarily agreed that *all* "Negro applicants for transfer to the maintenance crafts will be required to possess no more experience than the least qualified . . . Caucasian . . . . regardless of any experience requirements which might be validated . . . ."[103] This statement affects "several" people at most, does not make a finding of an intentional waiver, does not state that blacks were discriminated against, and suggests the establishment of a preference for blacks that pre-existed the racial quota.

The 1971 communication to Kaiser is represented by the Government as if it required the establishment of a training program with a racial quota: "The OFCC recommended at that time that a training program should be established and that at least 50 per cent of the new craft employees should be black."[104] This artful language does not accurately portray the document. In fact, the OFCC said merely that "[m]aintenance craft training programs are needed;" with respect to "direct hiring" into the crafts, it said that the hiring should include "at least the minority ratio that exists in the company's

102 Petition for a Writ of Certiorari of the Government, No. 78-436 at 18.

103 File Memorandum of January 31, 1973, Paragraph 4.

104 Petition for a Writ of Certiorari of the Government, No. 78-436 at 18.

recruitment area."[105] These statements do not suggest a government-fashioned racial quota in training programs. Moreover, they relate to the problem of underutilization rather than past discrimination and are more in the nature of comments than findings or determinations.[106] Despite the contrary claim of the Government, we can locate no statement in this document "that Kaiser did not actively recruit blacks for craft positions."[107]

The documents relied on by the Government could hardly be characterized as supporting the racial quota in this case.[108] The evidence shows that Kaiser and USWA were cognizant of OFCC requirements in establishing the racial quota, but devised it voluntarily and without

105 Attachment to letter of Jan. 25, 1971, Paragraph 24(g). (Emphasis added). According to the OFCC attachment, the minority ratio in the Gramercy area was set at 50 per cent. The minority ratio in the labor force was later fixed at 39 per cent.

106 *Id.* Indeed, it was "recommended" only that "plans be developed" to deal with the problems.

107 Petition for a Writ of Certiorari of the Government, No. 78-436 at 18.

108 The 1971 OFCC comments include helpful hints to the employer in the recruitment of minority workers, some of which appear to reflect underlying assumptions of the OFCC. For instance, it is suggested that Kaiser (1) identify minorities attending secretarial, commercial, and vocational schools, but contact only "the more promising students," (2) identify the "more promising students" at minority high schools to insure selection of "the 'cream of the crop,' " and (3) train "promising" minority youths with previous schooling in clerical fundamentals: "These employees loaded (sic) with day-to-day work and in very short time, usually 4 to 6 weeks, are capable of performing at the required level." Attachment to letter of January 25, 1971, Paragraph 24(c).

the Government's participation. The submission of the Government merely underscores the fact that the racial quota is *not* a government-devised remedy for past discrimination. Furthermore, if the file search of the Government could produce only two tenuously relevant documents relating to a plant under vigorous federal scrutiny, the only valid presumption to be drawn is that the no-discrimination findings of the district court and court of appeals are correct.[109]

A remand for consideration of the so-called missing evidence would be useless and wasteful.[110] In addition, the suggestion that a remand should be granted to "permit one of the parties or an intervenor to seek to prove prior discrimination" has no merit.[111] All of the parties, including the Government, had this opportunity in the district court. The minority workers at the Gramercy plant had as much notice of the pendency of this action

109 The weakness of the legal position of the Government is demonstrated by its reliance on a strained interpretation of two aged and insignificant documents in support of the contention that the results of nearly four years of litigation in the federal courts should be vacated. We doubt that the Government would ordinarily propose this course, especially when it had declined the opportunity to present evidence when the record was open in the trial court.

110 We are at a loss to imagine what the district court would be expected to do with the OFCC documents on remand. Perhaps, in making the unnecessary determination of whether the Executive Order even authorizes the racial quota, as suggested by the Government, the district court could also analyze whether the suggestions and statements of the OFCC were authorized under the Executive Order.

111 Petition for a Writ of Certiorari of the Government, No. 78-436 at 19.

as the members of the plaintiff class, yet none intervened. The suggestion of the Government is a transparent attempt to avoid the issue. In addition, the reliance on *Parson* v. *Kaiser Aluminum & Chemical Corp.*,[112] involving a different Kaiser plant, is hardly persuasive. Indeed, in *Parson*, the court of appeals described the Gramercy plant as a "plant where no prior discrimination could be shown."[113]

The Government professes to believe in its legal position, but its request that the Court remand the case belies its asserted confidence. If this Court does not wish to dispose of the issue presented, the proper action is to deny the writ of certiorari, not to order a useless and wasteful remand. Therefore, the request of the Government should be denied.

CONCLUSION

The racial quota of Kaiser and USWA violates Title VII. The decision of the Court of Appeals is correct. Valid reasons exist for a denial of the writ of certiorari. On the other hand, no useful purpose can be served by the remand suggested by the Government. If the Court decides to grant the writ, it should do so only to resolve the basic legal issue presented: the legality of a racial

112 575 F.2d 1374 (5th Cir. 1978).

113 *Id.* at 1391-92 n.35.

quota implemented at the expense of the seniority rights of non-minority employees to achieve a desired ratio of minority workers in designated jobs.

Respectfully submitted,

Michael R. Fontham
STONE, PIGMAN,
WALTHER, WITTMANN &
HUTCHINSON
1000 Whitney Bank Building
New Orleans, Louisiana 70130
Telephone: (504) 581-3200

Attorneys for Respondents